

(m) If the consular officer is unable to give final approval to the visa application or the petition, then the consular officer shall forward the petition to DHS, pursuant to § 42.43 or 8 CFR 204.313(i)(3), as applicable, for appropriate action in accordance with applicable DHS procedures, and/or refuse the visa application in accordance with § 42.81. The consular officer shall notify the country of origin that the visa has been refused.

(n) Notwithstanding paragraphs (d) through (m) of this section, an alien described in paragraph (n)(1) of this section may qualify for visa status under INA section 101(b)(1)(G)(iii) without meeting the requirements set forth in paragraphs (d) through (m) of this section.

(1) Per Section 4(b) of the Inter-country Adoption Simplification Act, Public Law 111-287 (IASA), an alien otherwise described in INA section 101(b)(1)(G)(iii) who attained the age of 18 on or after April 1, 2008 shall be deemed to meet the age requirement imposed by INA section 101(b)(1)(G)(iii)(III), provided that a petition is filed for such child in accordance with DHS requirements not later than November 30, 2012.

(2) For any alien described in paragraph (n)(1) of this section, the “competent authority” referred to in INA section 101(b)(1)(G)(i)(V)(aa) is the passport issuing authority of the country of origin.

[72 FR 61305, Oct. 30, 2007, as amended at 76 FR 67363, Nov. 1, 2011]

### Subpart D—Immigrants Subject to Numerical Limitations

SOURCE: 56 FR 49676, Oct. 1, 1991, unless otherwise noted.

#### § 42.31 Family-sponsored immigrants.

(a) *Entitlement to status.* An alien shall be classifiable as a family-sponsored immigrant under INA 203(a) (1), (2), (3) or (4) if the consular officer has received from DHS a Petition to Classify Status of Alien Relative for Issuance of Immigrant Visa approved in accordance with INA 204 to accord the alien such preference status, or official notification of such an approval,

and the consular officer is satisfied that the alien has the relationship to the petitioner indicated in the petition. In the case of a petition according an alien status under INA 203(a) (1) or (3) or status as an unmarried son or daughter under INA 203(a)(2), the petitioner must be a “parent” as defined in INA 101(b)(2) and 22 CFR 40.1. In the case of a petition to accord an alien status under INA 203(a)(4) filed on or after January 1, 1977, the petitioner must be at least twenty-one years of age.

(b) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child of a family-sponsored first, second, third or fourth preference immigrant or the spouse of a family-sponsored third or fourth preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

[56 FR 49676, Oct. 1, 1991, as amended at 61 FR 1836, Jan. 24, 1996]

#### § 42.32 Employment-based preference immigrants.

Aliens subject to the worldwide level specified in section 201(d) for employment-based immigrants in a fiscal year shall be allotted visas as indicated below.

(a) *First preference—Priority workers—*  
(1) *Entitlement to status.* An alien shall be classifiable as an employment-based first preference immigrant under INA 203(b)(1) if the consular office has received from DHS a Petition for Immigrant Worker approved in accordance with INA 204 to accord the alien such Preference status, or official notification of such an approval, and the consular officer is satisfied that the alien is within one of the classes described in INA 203(b)(1).

(2) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child or spouse of an employment-based first preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and

priority date of the beneficiary of the petition.

(b) *Second preference—Professionals with advanced degrees or persons of exceptional ability*—(1) *Entitlement to status.* An alien shall be classifiable as an employment-based second preference immigrant under INA 203(b)(2) if the consular officer has received from DHS a Petition for Immigrant Worker approved in accordance with INA 204 to accord the alien such preference status, or official notification of such an approval, and the consular officer is satisfied that the alien is within one of the classes described in INA 203(b)(2).

(2) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child or spouse of an employment-based second preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(c) *Third preference—Skilled workers, professionals, other workers*—(1) *Entitlement to status.* An alien shall be classifiable as an employment-based third preference immigrant under INA 203(b)(3) if the consular officer has received from DHS a Petition for Immigrant Worker approved in accordance with INA 204 to accord the alien such preference status, or official notification of such an approval, and the consular officer is satisfied that the alien is within one of the classes described in INA 203(b)(3).

(2) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the child or spouse of an employment-based third preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(d) *Fourth preference—Special immigrants*—(1) *Religious workers*—(i) *Classification based on qualifications under INA 101(A)(27)(C).* An alien shall be classifiable under INA 203(b)(4) as a special immigrant described in INA 101(a)(27)(C) if:

(A) The consular officer has received a petition approved by DHS to accord such classification, or an official notification of such approval; and

(B) The consular officer is satisfied from the evidence presented that the alien qualifies under that section; or

(C) The consular officer is satisfied the alien is the spouse or child of a religious worker so classified and is accompanying or following to join the principal alien.

(ii) *Timeliness of application.* An immigrant visa issued under INA 203(b)(4) to an alien described in INA 101(a)(27)(C), other than a minister of religion, who qualifies as a “religious worker” as defined in 8 CFR 204.5, shall bear the usual validity except that in no case shall it be valid later than September 30, 2003.

(2) *Certain U.S. Government employees*—(i) *General.* (A) An alien is classifiable under INA 203(b)(4) as a special immigrant described in INA 101(a)(27)(D) if a petition to accord such status has been approved by the Secretary of State. An alien may file such a petition only after, but within one year of, notification from the Department that the Secretary of State has approved a recommendation from the Principal Officer that special immigrant status be accorded the alien in exceptional circumstances and has found it in the national interest so to do.

(B) An alien may qualify as a special immigrant under INA 101(a)(27)(D) on the basis of employment abroad with more than one agency of the U.S. Government provided the total amount of full-time service with the U.S. Government is 15 years or more.

(C) Pursuant to INA 203(d), and whether or not named in the petition, the spouse or child of an alien classified under INA 203(b)(4), if not entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(ii) *Special immigrant status for certain aliens employed at the United States mission in Hong Kong.* (A) An alien employed at the United States Consulate General in Hong Kong under the authority of the Chief of Mission or an alien employed pursuant to section 5913

of title 5 of the United States Code is eligible for classification under INA 203(b)(4) as a special immigrant described in INA 101(a)(27)(D) provided:

(1) The alien has performed faithfully for a total of three years or more;

(2) The alien is a member of the immediate family of an employee entitled to such special immigrant status; and

(3) The welfare of the alien or the family member is subject to clear threat due directly to the employee's employment with the United States Government or under a United States Government official; and

(4) Subsequent to the Secretary's approval of the Principal Officer's recommendation and finding it in the national interest to do so, but within one year thereof, the alien has filed a petition for status under INA 203(b)(4) which the Secretary has approved.

(B) An alien desiring to benefit from this provision must seek such status not later than January 1, 2002.

(C) For purposes of § 42.32(d)(2)(ii)(A), the term *member of the immediate family* means the definition (as of November 29, 1990) in Volume 6 of the Foreign Affairs Manual, section 117k, of a relative who has been living with the employee in the same household.

(iii) *Priority date.* The priority date of an alien seeking status under INA 203(b)(4) as a special immigrant described in INA 101(a)(27)(D) shall be the date on which the petition to accord such classification is filed. The filing date of the petition is that on which a properly completed form and the required fee are accepted by a Foreign Service post.

(iv) *Petition validity.* Except as noted in this paragraph, the validity of a petition approved for classification under INA 203(b)(4) shall be six months beyond the date of the Secretary of State's approval thereof or the availability of a visa number, whichever is later. In cases described in § 42.32(d)(2)(ii), the validity of the petition shall not in any case extend beyond January 1, 2002.

(v) *Extension of petition validity.* If the principal officer of a post concludes that circumstances in a particular case are such that an extension of the validity of the Secretary's approval of special immigrant status or of the peti-

tion would be in the national interest, the principal officer shall recommend to the Secretary of State that such validity be extended for not more than one additional year.

(vi) *Fees.* The Secretary of State shall establish a fee for the filing of a petition to accord status under INA 203(b)(4) which shall be collected following notification that the Secretary has approved status as a special immigrant under INA 101(a)(27)(D) for the alien.

(vii) *Delegation of authority to approve petitions.* The authority to approve petitions to accord status under INA 203(b)(4) to an alien described in INA 101(a)(27)(D) is hereby delegated to the chief consular officer at the post of recommendation or, in the absence of the consular officer, to any alternate approving officer designated by the principal officer. Such authority may not be exercised until the Foreign Service post has received formal notification of the Secretary's approval of special immigrant status for the petitioning alien.

(3) *Panama Canal employees—(i) Entitlement to status.* An alien who is subject to the numerical limitations specified in section 3201(c) of the Panama Canal Act of 1979, Public Law 96-70, is classifiable under INA 203(b)(4) as a special immigrant described in INA 101(a)(27) (E), (F) or (G) if the consular officer has received a petition approved by DHS to accord such classification, or official notification of such an approval, and the consular officer is satisfied that the alien is within one of the classes described in INA 101(a)(27) (E), (F), or (G).

(ii) *Entitlement to derivative status.* Pursuant to INA 203(d), and whether or not named in the petition, the spouse or child of any alien classified under INA 203(b)(4) as a special immigrant qualified under this section, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(4) *Spouse and children of certain foreign medical graduates.* The accompanying spouse and children of a graduate of a foreign medical school or of a

person qualified to practice medicine in a foreign state who has adjusted status as a special immigrant under the provisions of INA 101(a)(27)(H) are classifiable under INA 203(b)(4) as special immigrants defined in INA 101(a)(27)(H) if the consular officer has received an approved petition from DHS which accords such status and the consular officer is satisfied that the alien is within the class described in INA 101(a)(27)(H).

(5) *Certain international organization and NATO civilian employees*—(i) *Entitlement to status*. An alien is classifiable under INA 203(b)(4) as a special immigrant defined in INA 101(a)(27)(I) or (L) if the consular officer has received a petition approved by the DHS to accord such classification, or official notification of such approval, and the consular officer is satisfied from the evidence presented that the alien is within one of the classes described therein.

(ii) *Timeliness of application*. An alien accorded status under INA 203(b)(4) because of qualification under INA 101(a)(27)(I) or (L) must appear for the final visa interview and issuance of the immigrant visa within six months of establishing entitlement to status.

(6) *Certain juvenile court dependents*. An alien shall be classifiable under INA 203(b)(4) as a special immigrant defined in INA 101(a)(27)(J) if the consular officer has received from DHS an approved petition to accord such status, or an official notification of such an approval, and the consular officer is satisfied the alien is within the class described in that section.

(7) *Certain members of the United States Armed Forces recruited abroad*—(i) *Entitlement to status*. An alien is classifiable under INA 203(b)(4) as a special immigrant described in INA 101(a)(27)(K) if the consular office has received a petition approved by the DHS to accord such classification, or official notification of such an approval, and the consular officer is satisfied from the evidence presented that the alien is within the class described in INA 101(a)(27)(K).

(ii) *Entitlement to derivative status*. Pursuant to INA 203(d), and whether or not named in the petition, the spouse or child of any alien classified under INA 203(b)(4) as a special immigrant qualified under this section, if not oth-

erwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(8) *Certain United States international broadcasting employees*—(i) *Entitlement to status*. An alien is classifiable as a special immigrant under INA 203(b)(4) as described in INA 101(a)(27)(M), if the consular office has received a petition approved by the DHS to accord such classification, or official notification of such an approval, and the consular officer is satisfied from the evidence presented that the alien is within the class described in INA 101(a)(27)(M).

(ii) *Entitlement to derivative status*. Pursuant to INA 203(d), and whether or not named in the petition, the spouse or child of any alien classified under INA 203(b)(4) as a special immigrant qualified under this section, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to derivative status corresponding to the classification and priority date of the beneficiary of the petition.

(9) *Certain victims of the September 11, 2001 terrorist attacks*—(i) *Entitlement to status*. An alien shall be classifiable as a special immigrant under INA 203(b)(4) as specified in section 421 of Public Law 107–56, if:

(A) The consular officer has received a petition approved by the DHS to accord such classification, or official notification of such an approval, and the consular officer is satisfied from the evidence presented that the alien is entitled to that classification; or

(B) The alien is the spouse or child of an alien so classified in paragraph (d)(9)(i) of this section and is accompanying or following to join the principal alien.

(ii) *Ineligibility exemption*. An alien classified under paragraph (d)(9)(i) of this section shall not be subject to the provisions of INA 212(a)(4).

(iii) *Priority date*. Aliens entitled to status under paragraph (d)(9)(i) of this section shall be assigned a priority date as of the date the petition was filed under INA 204 for classification under section INA 203(b)(4) and visas shall be issued in the chronological

order of application submission. However, in the event that the annual limit for immigrants under INA 203 is reached, the alien may retain the earlier priority date of the petition that was revoked.

(e) *Fifth preference—Employment-creation immigrants*—(1) *Entitlement to status*. An alien shall be classifiable as a fifth preference employment-creation immigrant if the consular officer has received from DHS an approved petition to accord such status, or official notification of such an approval, and the consular officer is satisfied that the alien is within the class described in INA 203(b)(5).

(2) *Entitlement to derivative status*. Pursuant to INA 203(d), and whether or not named in the petition, the spouse or child of an employment-based fifth preference immigrant, if not otherwise entitled to an immigrant status and the immediate issuance of a visa, is entitled to a derivative status corresponding to the classification and priority date of the beneficiary of the petition.

[56 FR 49676, Oct. 1, 1991, as amended at 56 FR 51172, Oct. 10, 1991; 56 FR 55077, Oct. 24, 1991; 60 FR 35839, July 12, 1995; 63 FR 4394, Jan. 29, 1998; 63 FR 68393, Dec. 11, 1998; 65 FR 80745, Dec. 22, 2000; 66 FR 15350, Mar. 19, 2001; 68 FR 24639, May 8, 2003]

#### § 42.33 Diversity immigrants.

(a) *General*—(1) *Eligibility to compete for consideration under section 203(c)*. An alien will be eligible to compete for consideration for visa issuance under INA 203(c) during a fiscal year only if he or she is a native of a low-admission foreign state, as determined by the Secretary of Homeland Security pursuant to INA 203(c)(1)(E), with respect to the fiscal year in question; and if he or she has at least a high school education or its equivalent or, within the five years preceding the date of application for a visa, has two years of work experience in an occupation requiring at least two years training or experience. The eligibility for a visa under INA 203(c) ceases at the end of the fiscal year in question. Under no circumstances may a consular officer issue a visa or other documentation to an alien after the end of the fiscal year

during which an alien possesses diversity visa eligibility.

(2) *Definition of high school education or its equivalent*. For the purposes of this section, the phrase high school education or its equivalent means the successful completion of a twelve-year course of elementary and secondary education in the United States or successful completion in another country of a formal course of elementary and secondary education comparable to completion of twelve years' elementary and secondary education in the United States.

(3) *Determinations of work experience*. For all cases registered for the 2003 Diversity Visa Program and Diversity Visa Programs occurring in subsequent fiscal years, consular officers must use the Department of Labor's O\*Net On Line to determine qualifying work experience.

(4) *Limitation on number of petitions per year*. No more than one petition may be submitted by or on behalf of, any alien for consideration during any single fiscal year. If two or more petitions for any single fiscal year are submitted by, or on behalf of, any alien, all such petitions will be void pursuant to INA 204(a)(1)(I)(i) and the alien by or for whom the petition has been submitted will not be eligible for consideration for diversity visa issuance during the fiscal year in question.

(5) *Northern Ireland*. For purposes of determining eligibility to file a petition for consideration under INA 203(c) for a fiscal year, the districts comprising that portion of the United Kingdom of Great Britain and Northern Ireland, known as "Northern Ireland", will be treated as a separate foreign state. The districts comprising "Northern Ireland" are Antrim, Ards, Armagh, Ballymena, Ballymoney, Banbridge, Belfast, Carrickfergus, Castlereagh, Coleraine, Cookstown, Craigavon, Down, Dungannon, Fermanagh, Larne, Limavady, Lisburn, Londonderry, Magherafelt, Moyle, Newry and Mourne, Newtownabbey, North Down, Omagh, and Strabane.

(b) *Petition requirement*. An alien claiming to be entitled to compete for consideration under INA 203(c) must file a petition with the Department of State for such consideration. At the